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ABSTRACT

Teacher improvement programs must comply with federal and state constitutional requirements for due process, equal protection, and freedom of speech, as well as state and federal laws covering collective bargaining, civil rights, and the authority to institute improvement programs. This booklet explores these legal considerations, focusing on authority, conflicts with existing law, and processes for ensuring fairness and equity. The first chapter covers the delegation of authority and limitations of authority for policy-making, noting the roles played by state legislatures, state boards of education, and local educational agencies. The second chapter looks at the law on tenure and collective bargaining, pointing out that laws and regulations governing teacher improvement plans must conform to the existing laws or these laws must be changed. Chapter 3 considers due process requirements and the elements in the adversarial process. Federal and state civil rights laws protecting teachers from discriminatory treatment are the subject of the fourth chapter. Notes discuss the relevance of specific court cases to the topics addressed in the text. (PGD)

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LEGAL

The Legal Context for Teacher Improvement

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LEGAL CONTEXT

The Legal Context for Teacher Improvement
No. TQ84-6

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The views expressed in this paper are the authors' and do not necessarily reflect the views of the Education Commission of the States.

The Education Commission of the States is a nonprofit, nationwide interstate compact formed in 1965. The primary purpose of the commission is to assist governors, state legislators, state education officials and others to develop policies to improve the quality of education at all levels. Forty-eight states, the District of Columbia, American Samoa, Puerto Rico and the Virgin Islands are members. The ECS central offices are at 1860 Lincoln Street, Suite 300, Denver, Colorado 80295. The Washington office is in the Hall of the States, 444 North Capitol Street, N.W., Suite 248, Washington, D.C. 20001.

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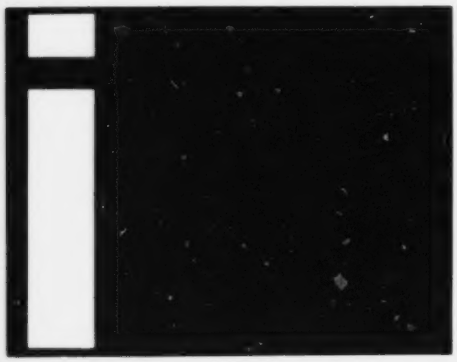
INTRODUCTION



The law requires fairness in public policy. It requires programs to be free from discrimination based on race, sex or other inappropriate attributes of employees and participants. It requires rational decision making. These principles should guide any sound policy for promoting teacher quality.

SIGNED

This paper reviews the legal environment surrounding initiatives to improve the quality of teaching. As a general rule, laws do not pose barriers to these initiatives, but legal considerations may affect how initiatives are designed. Teacher improvement programs must comply with federal and state constitutional requirements for due process, equal protection and freedom of speech. State laws covering authority to create such programs, collective bargaining and civil rights may also be important.

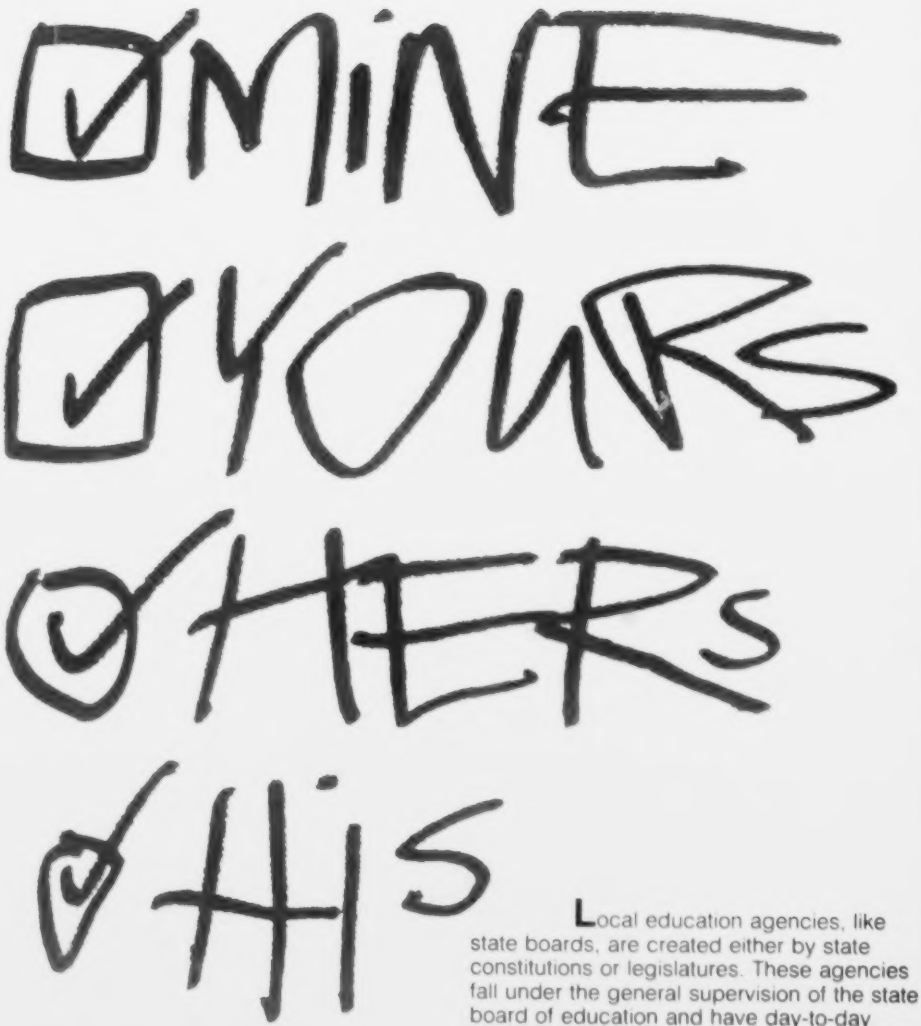
The following are the most significant legal questions to be asked of any teacher improvement program:

- **Who should decide basic policy? Does the state board have the authority? Do local education agencies? Is new legislation needed to carry out a particular policy?**
- **Does the program conflict with existing laws, particularly collective bargaining and tenure laws?**
- **What minimum constitutional requirements of fairness must be met in the operation of the program?**
- **Is the program equitable to teachers? Does it provide equal opportunity to racial minorities, women and other protected groups?**
- **Does the program threaten teachers' freedom of speech or academic freedom?**

A body of case law dealing with very similar situations — merit pay in post-secondary institutions, for example — can provide guidance in answering these questions. Statutes should also be consulted. Failure to resolve conflicts with existing laws or to base a program on proper legal authority can delay implementation, possibly cause the program to be declared unconstitutional and cost money. Proof of race or sex discrimination against teachers can result in costly judgments against a state or school district. A program implemented in a way that violates requirements for free speech or due process can also be expensive. The results of policy errors extend far beyond the obvious costs of back pay and attorney fees to the costs of lost talent: exceptional teachers will leave a system that treats them unfairly.

1. WHO DECIDES POLICY?

Three major bodies are responsible for public elementary and secondary education policy: state legislatures, state boards of education and local education agencies. State constitutions place ultimate responsibility for education on the legislature. State boards of education may be created by the constitution or the legislature. Because they are generally administrative in nature, state boards of education interpret policy enacted by the legislature. Legislatures and some state constitutions give state boards specific policy-making authority, but this authority is often limited.[1]



Local education agencies, like state boards, are created either by state constitutions or legislatures. These agencies fall under the general supervision of the state board of education and have day-to-day responsibility for school operations.[2] Although they bear much of the responsibility for providing education, their ability to initiate policy is limited. Once a state policy is in place, local agencies may carry it out only as determined by the legislature and interpreted by the state board.[3]

Delegation of Authority

State legislatures have plenary power, that is, they may develop any kind of policy they wish, as long as it does not violate constitutional requirements. Legislatures most often exercise this power by enacting general policies and delegating implementation. The delegation doctrine governs the amount and type of authority legislatures can give an administrative body. Thus, a legislature may expand or withdraw powers it has conferred by statute on a state board, but it may not alter board authority derived from the state constitution.[4] Additionally, the separation of powers implicit in state constitutions forbids legislatures from delegating lawmaking authority or altering the constitutional governance scheme.

When these delegation rules are applied, results vary according to the source of authority and the body attempting to exercise authority. Consider the simple question of whether the state board or the legislature has authority to set standards for graduation from teacher training institutions. If the state constitution delegates authority to the state board to set these standards, the legislature may not pass a law requiring standards different from those set by the board. The legislature could establish graduation standards only if the constitution were amended. By contrast, where the state constitution specifically authorizes the legislature to set these standards, the legislature cannot hand this task to the state board of education without, at minimum, offering the board some statutory guidance. The requirement that lawmaking authority remain in the legislature is violated if the legislature fails to provide this guidance. Where the constitution is silent, the legislature may set whatever standards it wants, or it may delegate the responsibility for setting standards to the board.[5]

A legislature's delegation of authority also is unconstitutional when delegation is to a nonpublic agency.[6] Thus,

states considering changing teacher pay systems should be careful that the responsibilities of state officials (for program design or program monitoring, for example) are not delegated to teacher unions or other nonpublic groups.

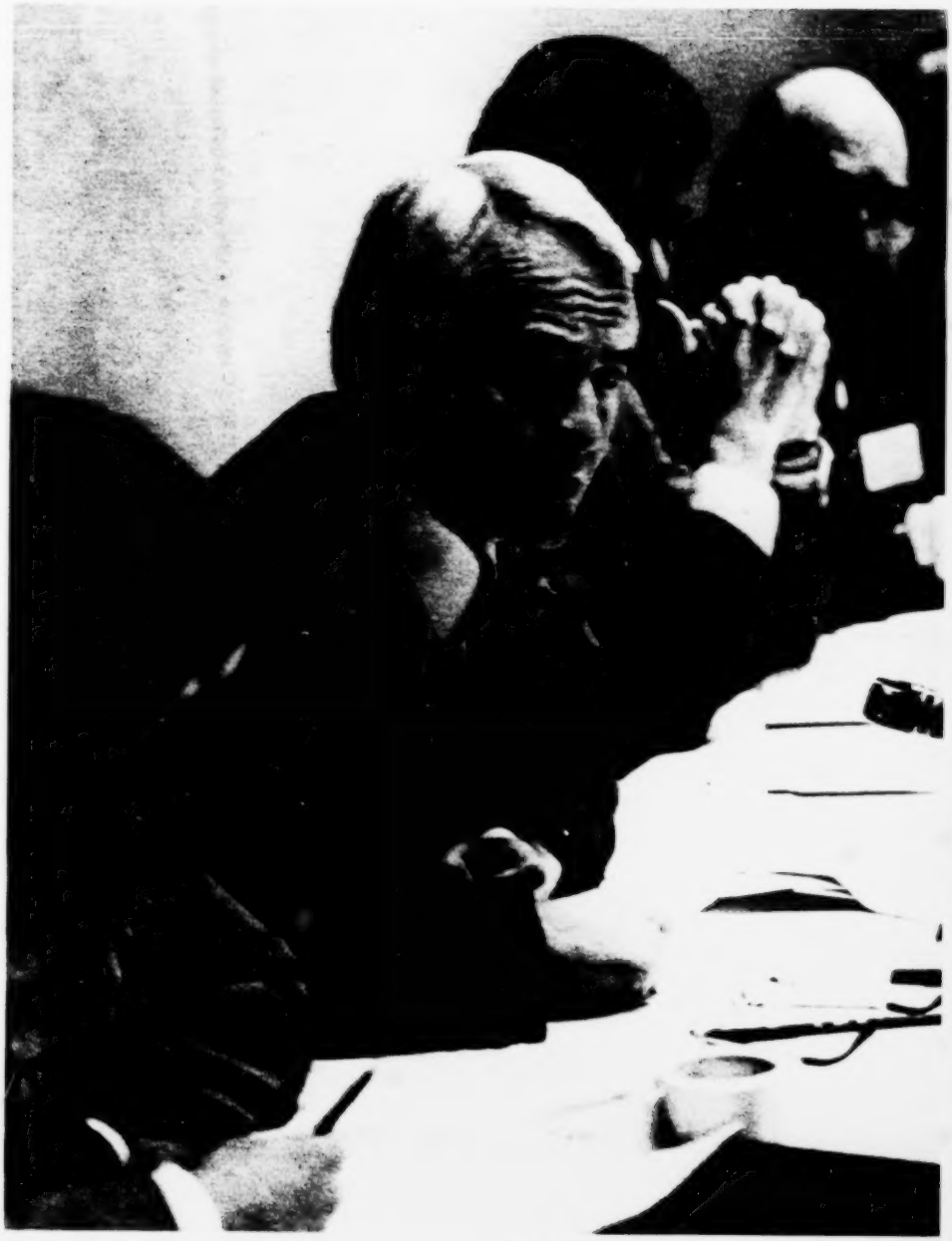
Limits on Agency Authority

Any time a public agency acts beyond the authority given in the constitution or statutes, the action is termed **ultra vires.** A statute must expressly authorize an agency action or the action must be reasonably implied — that is, it must flow naturally from express authority.[7] For example, where a statute requires the state board to hire a superintendent of public instruction, the board has express authority to take that action. The board may then create job qualifications, place job announcements, interview applicants and perform other tasks, using the authority implied in its duty to hire.

A recent Louisiana case demonstrates an ultra vires action. The Louisiana legislature established a supplemental pay plan for teachers who in five years completed 15 hours of additional study in their fields. A "Professional Improvement Committee" was established to administer the plan. When the committee increased the hours of additional study to 30, the court held that this action exceeded the committee's authority.[8] An agency action that cannot be traced to the constitution or a statute or an action that conflicts with them is ultra vires and void.

2. CONFLICTS WITH EXISTING LAWS

New legislation must coexist with laws already in place. Legislatures should, therefore, routinely examine old laws to determine whether amendments are needed to make them compatible with new laws. If old and new statutes conflict, courts will first try to make them compatible, allowing the more specific rules to prevail. If this is impossible, the new law will be treated as implicitly repealing the old.



SO OVER

New teacher initiatives may require restructuring of often complex personnel provisions. Administrative procedures, performance evaluation requirements, and tenure or seniority laws present possible areas of conflict. The legislature may always revise personnel laws, of course. But since many existing laws provide protection for teachers, abrupt removal is likely to cause dissension, if not court challenge.

Tenure Laws

Existing teacher tenure laws are for the most part compatible with pay-for-performance initiatives. Every state provides for public school teachers to remain employed unless they are dismissed for cause. Some state statutes use the term "tenure," others speak of "permanent employees" or "continuing status." In 30 states, teachers who have not been given notice of nonrenewal receive tenure almost automatically after a period of probationary employment (usually three years). In other states, specific actions must be taken for teachers to receive tenure.[9] Some tenure statutes do not address performance evaluation; some address it in great detail; and some authorize the state board to address it.[10] In any case, performance evaluation requirements can be added to tenure policies. Although many observers feel that tenured teachers are not subject to sufficiently critical evaluation, the basic concept of tenure requires evaluation before teachers acquire this status, and permits dismissal of incompetent teachers.

Tenure is generally regarded as a statutory right rather than a contractual one. This means that a legislature may alter or abolish tenure without constitutional problems.[11] In the rare case where a tenure system confers contractual rights, due process requirements and constitutional prohibitions against impairing contracts protect teachers. As a rule, laws changing tenure rights must be prospective rather than retroactive. Note too, that tenure laws or other laws that prohibit demotions or pay reductions may automatically perpetuate master teaching positions, unless these positions are explicitly made temporary.[12]

Collective Bargaining Laws

Ensuring that new teacher policies are compatible with collective bargaining laws presents intricate problems. The 33 states that require or allow teacher collective bargaining must carefully consider the effect of these laws on any new system of financial reward based on merit. The laws vary widely in language and scope. All but a handful have been enacted in the past two decades, many are still undergoing legislative amendment, and the courts have been active in construing them.

Whether teacher performance initiatives will be subject to bargaining depends on the nature of the collective bargaining scheme. The legislature may, of course, amend prior law, but politically this may prove a difficult task. The wisest course will be to examine the collective bargaining law carefully to determine what must be negotiated, what may be negotiated and what is exempt from negotiation.

Specific provisions of some laws have direct implications for performance-based pay programs. Generally, wages, benefits, and terms and conditions of employment are subject to collective bargaining. Standards used in evaluation are not likely to be covered by collective bargaining agreements. Initiatives that affect wages would seem to require bargaining in virtually all 33 states, although many state statutes have other provisions that allow differential wages, rewards and promotions.

Eleven states with collective bargaining arrangements specifically exclude merit systems from negotiation.[13] In Kansas, for example:

> **The scope of a memorandum of agreement may extend to all matters relating to conditions of employment, except proposals relating to . . . the authority and power of any civil service commission, personnel board, personnel agency or its agents established by statute, ordinance or special act to conduct and grade merit examinations and to rate candidates in the order of their relative excellence, from which appointments or promotions may be made. . . .**[14]

Kansas law also specifies that the collective bargaining statute will not diminish the right of a public employer to decide how to carry out operations or to determine which personnel are responsible for which tasks. It expressly states that a bargaining agreement cannot change matters that have been fixed by statute or by the constitution.[15] The combined effect of these laws is that a performance-based pay system may be instituted whether or not the bargaining unit approves. However, the amount of money paid to teachers on career ladders or the amount of bonus pay for exceptional teachers must still be negotiated.

In Iowa, the collective bargaining statute covers wages, supplemental pay, seniority, job classifications, evaluation procedures and inservice training. Further, teachers are specifically excluded from a civil service requirement that all appointments and promotions be made solely on the basis of merit and fitness.[16] In Iowa, virtually any pay-for-performance initiative must be negotiated.

Where the collective bargaining law and a new teacher-pay law conflict, the collective bargaining law may determine which will prevail.

- **In Connecticut, the terms of the bargaining agreement prevail over statutes and regulations.[17]**
- **In Wisconsin, the agreement supercedes statutes relating to wages, hours and conditions of employment.[18]**
- **In Washington, the agreement prevails over rules and regulations only.[19]**
- **In Hawaii, the collective bargaining statute prevails over specific sections of law and administrative regulations.[20]**
- **In Florida, Kansas, Minnesota and New York, provisions that conflict with existing law will not become effective until the legislature resolves the conflict. This reverses the usual court rule that the most recent enactment prevails.[21]**
- **In Kansas, constitutional and statutory provisions may not be bargained; in Wisconsin, statutory missions and goals may not be bargained.[22]**
- **In Maryland, the local school board determines the final scope of negotiation.[23]**

Each state needs to examine its collective bargaining and public employment laws to determine what elements, if any, of a pay-for-performance program need to be negotiated. A reminder: states that permit collective bargaining agreements to supercede statutes may be violating the rule against delegating essential lawmaking responsibility to a nongovernmental body.

3. HOW TO ASSURE FAIRNESS

The fourteenth amendment to the U.S. Constitution prohibits states from depriving "any person of life, liberty or property without due process of law. . . ."[24] State constitutions have similar provisions. The overriding purpose of these clauses is to protect individuals from arbitrary state action. In a word, they require the state to be fair.

NOT SATISFACTORY

What Triggers Due Process?

Due process is triggered when an action affects a property or liberty interest of an employee. In ***Board of Regents v. Roth,*** the U.S. Supreme Court made it clear that the question of whether a property right exists is a matter of state law or construction:

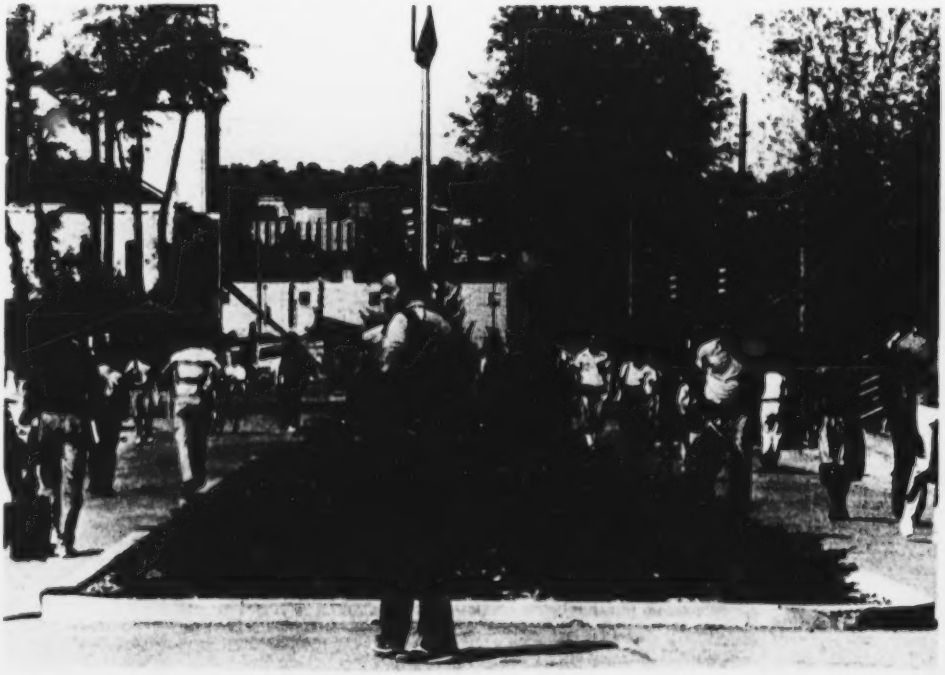
> **Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement. . . .[25]**

Liberty interests include constitutionally protected rights, such as free speech, but they also include intangible interests such as an individual's interest in obtaining future employment. In ***Roth,*** the Supreme Court explained the parameters of an employee's liberty interest. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he is simply not rehired in one job but remains as free as before to seek another."[26] Firing an employee seldom infringes a liberty interest that the courts will recognize.

Due process may be triggered where public officials hire, promote, reward or dismiss employees.[27] Teachers who do not meet the criteria for merit pay, bonus pay, promotion or appointment as master teachers cannot reasonably expect a hearing because the interest in continuing employment is not affected, but notice and fairness in the evaluation process will be required.[28] On the other hand, a decision not to promote an eligible teacher on a career ladder would probably invoke the full panoply of due process if failure to move up the ladder affects the teacher's interest in continuing employment.[29]

What Process Is Due?

All teachers are entitled, at minimum, to a system in which procedures are uniformly applied and articulated in advance. As well, all teachers have a right to be free from arbitrary actions, and to expect an agency to follow its own rules and regulations.[30]



Where states have altered graduation requirements for high school students, courts have required two or three years' advance notice.[31] There is no similar precedent for teachers. But the notice required for implementing a pay-for-performance plan will be affected by factors such as collective bargaining agreements, existing state law and regulations governing teachers, the requirements of the proposed plan and, of course, the effect of the plan on a property interest. Notice must be substantial for a policy that affects the status of tenured teachers. Notice will also be required when a policy affects the terms of a bargaining agreement. Notice in all cases should be sufficient to allow those affected time to meet new requirements.

The need for formal procedures increases with the significance of the interest affected. For example, procedural requirements are more strict for dismissing a permanent teacher (who has a property interest) than they are for dismissing a probationary teacher (who generally has no reasonable expectation of continuing employment).[32] Of course the general rule that probationary teachers have no contractual interest in continuing employment, and therefore no due process rights, may be altered by statute or regulation. Several states require that, before termination, a probationary teacher be given a statement of reasons. In these states, failure to provide reasons would violate due process.[33]

The Adversarial Process

In some cases, an adverse action, such as denial of a promotion, will require only a conversation to satisfy due process. But often personnel actions against teachers will invoke the full and formal requirements of due process.[34] When a teacher's interest in continuing employment is affected, he or she must generally receive adequate notice of the adverse action, a hearing and a right to review. Specific aspects of these and other requirements are discussed below.

Adequate Notice

A teacher must be given enough time to prepare a defense to charges given as grounds for dismissal. What constitutes enough time will vary with the action taken and the interest of the employee. Nonrenewal of a probationary teacher's contract or placing an unfavorable evaluation in a teachers' file will require minimal notice, but dismissing a tenured teacher will require early and detailed notice.[35]

Hearing

A tenured teacher who has received notice of an impending adverse action has the opportunity for a hearing. The hearing allows both sides to present materials relevant to the proposed personnel action. The teacher generally has a right to cross-examine witnesses presented by the opposing side, present witnesses on her own behalf, challenge the validity of evidence proffered against her and enter supporting evidence. Whether she has a right to counsel is unclear; that right may, of course, be granted legislatively.[36] Teachers have only an opportunity for a hearing rather than a right to one; failure to respond in time will result in loss of the opportunity.

Unbiased Decision Maker

Due process also requires that decisions be made by unbiased decision makers.[37] Some pay-for-performance systems establish state or local committees of teachers, administrators and lay people to recommend recipients of supplemental pay, or evaluate teacher performance. Since due process requires impartiality, a process for eliminating biased committee members is important.

Final Decision Requirement

Due process requires that an administrator make a final decision on the merits of an action.[38] These administrators must have access to the complete record, and although they may rely on the recommendations of a hearing officer, the basis for the decision must be made clear.[39] This requirement assures that people know who made the decision and why. In most instances, a final administrative decision must precede judicial review.

Judicial Review

Judicial review of administrative decisions affecting job status or wages is generally available to a teacher only when a property or other important interest is affected, although it may be allowed under other circumstances.[40] Most decisions on merit pay, career ladders and master teachers will not be eligible for review. However, where constitutionally protected interests are challenged or the constitutionality of a law is questioned, judicial review may be obtained before administrative remedies have been exhausted. Since judicial review of administrative decisions is generally limited to the question of whether a decision was arbitrary, capricious or without regard to the law, the burden is on the complaining party to show that the decision was tainted.[41]

4. HOW TO ASSURE EQUITY

Equitable treatment of teachers is not only good policy, it is required. Occasionally, however, blatant acts of discrimination based on race or sex enter into the decision to hire, fire or promote a teacher. Most of the civil rights laws discussed below make such intentional acts of discrimination illegal.

There is no intrinsic conflict between equity and teacher incentives. Pay increases based on merit, long used by postsecondary institutions, have withstood challenge based on equity considerations. But problems do occur when a system is deliberately used to discriminate for inappropriate reasons. That is, discrimination based on a sound evaluation of a teacher's competence is valid; basing such a decision on race or sex is not. An individual who shows only that he or she has received less-than-average pay increases will not be able to establish that the constitution or civil rights laws have been violated.

This section will first review the primary constitutional and statutory provisions for equity, and then will consider the circumstances surrounding testing and what to do when race or sex imbalance is precipitated by a pay-for-performance program.

Federal Requirements for Equity

The Constitution of the United States forbids discrimination by public agencies. So do the federal Civil Rights Act of 1964, the Equal Pay Act of 1963, the Education Amendments of 1972 and the Rehabilitation Act of 1973. While these laws sometimes overlap, they differ as to the populations protected, activities covered, enforcement mechanisms, remedies authorized and other details. The most important of these details are summarized below.

The U.S. Constitution

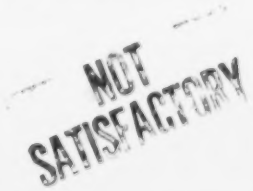
The fourteenth amendment to the Constitution requires states to provide "equal protection" to all persons. It prohibits intentional unequal treatment of groups of people.[42] The U.S. Supreme Court, however, has taken a practical approach and will permit differential treatment if there is adequate justification. The level of justification required by the Court depends on the nature of the class or right affected by the state action. A plan to improve education by rewarding excellent teachers more than mediocre ones would require as justification only a "rational basis" — a legitimate government purpose — to satisfy equal protection.[43] On the other hand, a plan to treat people differentially based on race will be subject to "strict scrutiny" and require a "compelling" justification to satisfy equal protection.[44] Sex discrimination requires middle-tier justification: the discrimination must serve "important" government objectives, and a "substantial relation" must exist between the classification and these objectives.[45] If a fundamental constitutional right is at stake, courts will require compelling justification and stricter review. Normally, a teacher's claim to advancement or other rewards does not trigger stricter review.[46]

Civil Rights Act of 1964, Title VII

Because courts prefer statutory grounds for a decision, most challenges to programs that disproportionately exclude groups from jobs, promotions or other employment benefits rely on the civil rights statutes.[47] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, national origin, sex or religion in the public and private sectors.[48] Certain exclusions, however, are permissible. The statute expressly permits programs based on seniority or merit. Discrimination based on race or sex is allowed only if race or sex is a bona fide occupational qualification (as it would be for playing Othello, which requires a black male actor).[49]

The U.S. Supreme Court has identified two types of discrimination under Title VII: "disparate treatment" in which some individuals are treated differently from others solely because of race, sex or other protected classifications, and "disparate impact" in which an employment policy has a discriminatory effect on an entire class of people. In the disparate treatment cases, the Court requires at least circumstantial evidence of discriminatory intent.[50] In disparate impact cases, the Court accepts statistics showing discrimination against a protected group as prima facie evidence of wrong-doing.[51] If the statistics indicate imbalance, the employer must prove that the policy that produced the imbalance is relevant to the requirements of the job.

In either type of case, courts examine the reasons for decisions. They scrutinize the evaluation process, the criteria used and the surrounding circumstances. Courts have, for example, overturned decisions based on defective procedures, treating the defect as circumstantial evidence of discrimination.[52] They have also accepted policies based in part on subjective criteria.[53] Sanctions under Title VII can include court orders halting illegal practices, back pay and reversal of some decisions.



The Equal Pay Act

The Equal Pay Act of 1963 prohibits discrimination by sex in the payment of wages for work requiring "equal skill, effort, and responsibility, and [performed under] . . . similar working conditions."[54] Seniority systems and merit systems are expressly excluded from the Act. By Supreme Court interpretation, the law allows distinctions in pay for many reasons, but not on the basis of sex.[55] Pay-for-performance policies will generally survive an Equal Pay Act challenge.

Title VI

Title VI of the 1964 Civil Rights Act does not cover discrimination in employment, but it does prohibit the use of federal funds in employment training programs that discriminate racially.[56] Like Title VII, Title VI prohibits intentional acts of discrimination against

individuals and will scrutinize the unintended discriminatory effects of policies against a class. Title VI regulations require correction of racial imbalance in federally funded training programs.[57] Sanctions include the withholding of federal funds.

Title IX

Title IX of the Education Act Amendments of 1972 prohibits sex discrimination in federally funded education programs.[58] Like Title VI, it authorizes withholding of federal funds as a sanction. Unlike Title VI, Title IX contains numerous exceptions: religious and military institutions, traditionally single-sex institutions and beauty contests, for example.[59] Imbalance is not actionable, because the law provides that nothing in its broad prohibition "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist. . . ."[60] The law covers all public and private education institutions and expressly authorizes judicial review.[61] In two of the few Supreme Court decisions made under Title IX, the Court has held that an individual may bring suit under Title IX,[62] and that it covers employment.[63]

Section 504

Incentives for teachers that fail to consider the effect on handicapped teachers can collide with Section 504 of the Rehabilitation Act of 1973.[64] This law, modeled after Title VI, forbids discrimination against the handicapped in federally funded programs. It provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."[65] Many of the rules for Titles VI and VII apply by incorporation in the statute,[66] and any procedure that works to disqualify handicapped teachers must be relevant to the legitimate goal of rewarding excellent teachers.

Special Issues: Testing and Affirmative Action

Testing

Using tests poses some very special problems. Their use is expressly allowed under Title VII, as long as they are "not designed, intended or used" for discriminatory purposes. Still, tests used to determine applicants' job qualifications have been frequently challenged in disparate impact litigation. In ***Washington v. Davis,*** a leading case, the Supreme Court held that employment practices that tend to exclude racial minorities are invalid if they do not clearly relate to job performance.[67] The Court's advice in this case is instructive:

> **Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. . . . Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor so that race, religion, nationality, and sex become irrelevant.[68]**

Furthermore, the Court requires that tests used in employment be thoroughly validated for a job-related purpose.[69] Preliminary analysis of job requirements is essential, since courts have consistently

required states to show evidence of this analysis and to demonstrate the relationship between job requirements and the test.[70]

(The Educational Testing Service, which prepares the widely used National Teacher Examination, has not validated this test for promotions, merit pay or any other inservice decisions and does not recommend using it for these situations.)

Affirmative Action

Race and sex imbalance is illegal under Title VII where a policy has a disparate impact on a protected group; and racial imbalance violates the regulations under Title VI. Under the Constitution, however, public agencies have not been held responsible for correcting racial imbalance caused by factors beyond their control. The requirements of Titles VI and VII, which together reach most employment and employment training programs and which are particularly relevant in sex and race discrimination, mean that policy makers should carefully monitor the impact of incentive programs on female and minority teachers. If these teachers are not fully represented in the program, steps should be taken to recruit them. If this does not correct the imbalance, policy makers must decide whether their criteria are defensible in court. If the criteria are defensible, plaintiffs will not prevail.

Using quotas to solve this kind of problem requires care, since quotas discriminate against individuals in the overrepresented class, usually whites and males.[71] Courts have accepted quotas, nonetheless, in a variety of circumstances. Generally, quotas must be temporary and carefully designed to correct past inequities. Of course, districts already under court order to desegregate faculty must consider the impact of any pay-for-performance program on the racial balance in their staff.

In sum, courts can require that incentive plans include an affirmative action component to remedy past violations of the law. It is also clear that courts may require affirmative action only after making a formal finding of wrongdoing.[72]

State Laws Requiring Equity for Teachers

States are free to enact equity requirements more stringent and more specific than those set by federal law. Nineteen states have passed equal rights amendments to their constitutions that prohibit discrimination on the basis of sex and require stronger justification for sex discrimination than does the U.S. Constitution.[73]

Some state statutes clearly require equal treatment and equal pay in employment. Other state statutes guarantee equity in places of public accommodation, and court interpretation will generally be required to determine whether these statutes cover employment. State statutes guaranteeing equal treatment in employment generally provide some or all of the following protections:

- **Equal treatment in determination of salary, raises, benefits and other forms of compensation**
- **Equal treatment in hiring and promotion decisions**
- **Equal treatment in dismissal and firing decisions**
- **Affirmative action by employers found to have discriminated**

Since state laws may be broader than federal laws, in terms of persons covered, actions covered and remedies, their potential should not be overlooked.[74] State laws may also be clearer. For example, it took a decision by the U.S. Supreme Court to determine whether Title IX applied to employees of educational institutions. Yet the Alaska statute, which is similar to Title IX, very clearly includes such employees.[75]

Some state statutes cover more activities than their federal counterparts. Title VI and Title IX, for example, cover employees only in programs that receive federal assistance[76] whereas state statutes usually cover all public employment regardless of the funding sources.

Academic Freedom

The right of teachers to free speech is twofold. Like anyone else, a teacher has the right under the first amendment to the U.S. Constitution to speak without fear of reprisal on matters of concern outside the classroom. A teacher also has the right under the first amendment to academic freedom. That is, a teacher has the right to teach in a particular way and to modify course content. The U.S. Supreme Court has declared that "[f]irst [a]mendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[77] Tradition, teachers' contracts or union contracts may also provide for academic freedom.

Teachers' academic freedom is, however, somewhat limited in elementary schools where courts have noted that young children do not have the capacity to absorb and understand many concepts that run contrary to their experience and beliefs. Academic freedom is less limited for secondary school teachers. As described by one federal court:

To restrict the opportunity . . . for the free exchange of ideas would not only foster an unacceptable elitism, it would also fail to complete the development of those not going on to college, contrary to our constitutional commitment to equal opportunity. . . . Consequently, it would be inappropriate to conclude that academic freedom is required only in the colleges and universities.[78]

The teacher's right to teach derives from the student's right of access to information.

The students' right to know provides the basis for the teacher's right to teach. The students' right to learn is, therefore, the basic right, basic in the sense that the United States has made every attempt to provide a student with the right to a good education. Although it is a derived right, the teacher's right to teach is a necessary one, if the student is to learn.[79]

School officials retain the right to limit activities that disrupt or jeopardize students or the school environment. Difficulty arises only when decisions affecting teaching are made for inappropriate reasons. Courts will balance the teacher's interest in academic freedom against the interests of society as a whole.[80] Judgments against school districts found to have violated first amendment rights have included payment of legal fees, reinstatement of fired teachers and back pay.[81] But where teachers have refused to adhere to curricular requirements[82] or have continued to present inflammatory material despite repeated warnings,[83] courts have upheld disciplinary action.

Academic freedom, then, does not give a teacher free rein over classroom materials; it merely protects the teacher's right to present material not specifically forbidden, in a manner that is not provocative. It also protects the teacher from adverse action taken in reprisal for public statements or actions, or for presenting material that is simply controversial.

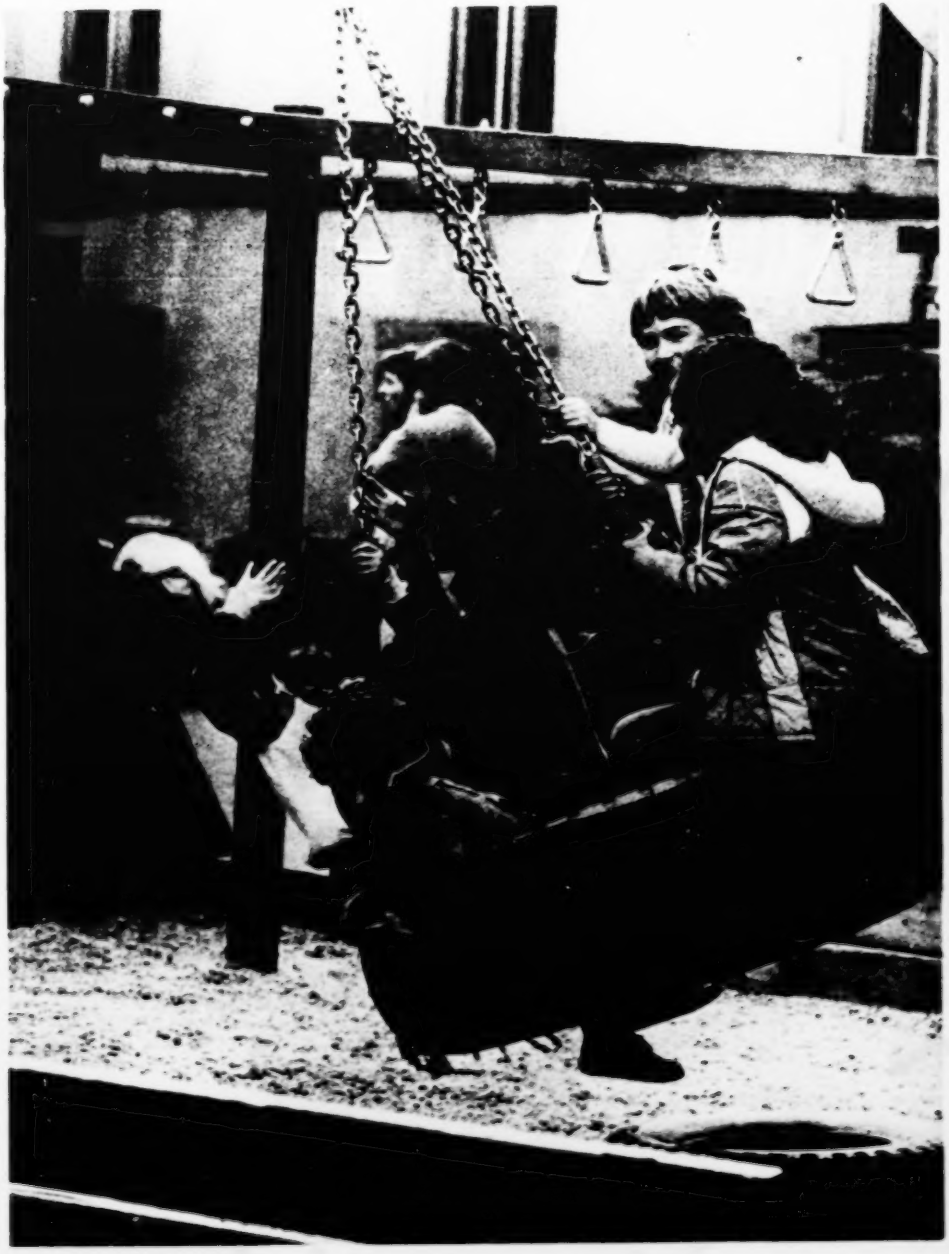
It is unlikely that pay-for-performance plans will be designed to limit teacher expression. But these plans, no matter how practical and fair, may be invalid if they are used to restrict free speech in the classroom.[84] The following examples illustrate situations in which infringement of academic freedom could be alleged.

- **Teachers are retained or promoted based on the test results of their students. The teacher who requires students to memorize specifics covered in a test is rewarded; the teacher who focuses on broad knowledge of a subject does not receive a promotion.**
- **The board of education, known to favor a specific teaching methodology, decides to implement a career ladder program. The only teachers placed on the highest level of the ladder are those subscribing to the board's preferred teaching method.**

Academic freedom cases have focused on disciplinary action against teachers for the techniques they use or the ideas they express in the classroom. Refusal to promote a teacher on the basis of techniques or ideas will be subject to the same legal constraints.

5. CONCLUSION

In general, law is not a barrier to performance-based rewards for teachers. Evaluating teachers and rewarding them for their performance impose no new requirements on states and school districts. Policy makers should, however, understand the legal principles applying to the following areas:



Lines of Authority

Examining the authority vested in the state and local boards of education by the state constitution and state statutes is an important first step in drafting teacher reforms. Legislatures may not trespass on authority constitutionally delegated to state boards. State or local boards may not initiate reforms unless they have constitutional or statutory authority. Since many states delegate the hiring, firing and determination of pay for teachers to local education agencies, state boards may be constrained under current law from changing these policies.

Existing Statutes

Performance-reward programs may change how states certify teachers, set pay scales and promote teachers. New legislation may be needed to implement these programs. Some tenure laws may prohibit salary reductions, demotions or denial of raises — provisions that may need to be changed to accommodate career ladder plans.

Fairness in Evaluations

Evaluations must follow uniform procedures and be free of arbitrary actions. Teachers must be informed of standards and procedures in advance. They must be given specific reasons for poor ratings and opportunities to improve their performance. Where a teacher is to lose a property right — such as a right to continued employment — a full hearing is required.

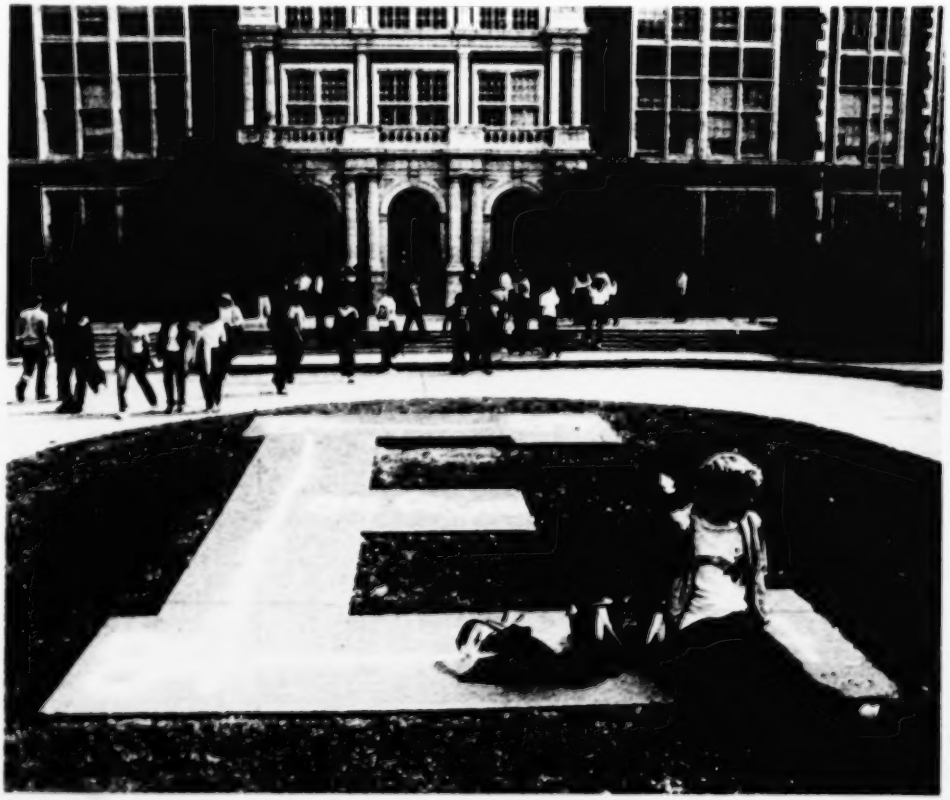
Decisions Based on Merit

The right of an employer to base differential rewards to employees on merit is well established. State and federal constitutions and civil rights laws prohibit basing decisions on race, sex or handicap. Even an unintentional racial imbalance may in some cases raise questions of equity.

Academic Freedom

Teachers should not be barred from advancement or reward under an incentive program merely because they have expressed unpopular beliefs or used an unusual teaching method. However, where the espousal of beliefs or the use of a controversial method adversely affects an educational program, disciplinary action may be warranted.

I SEE ME !



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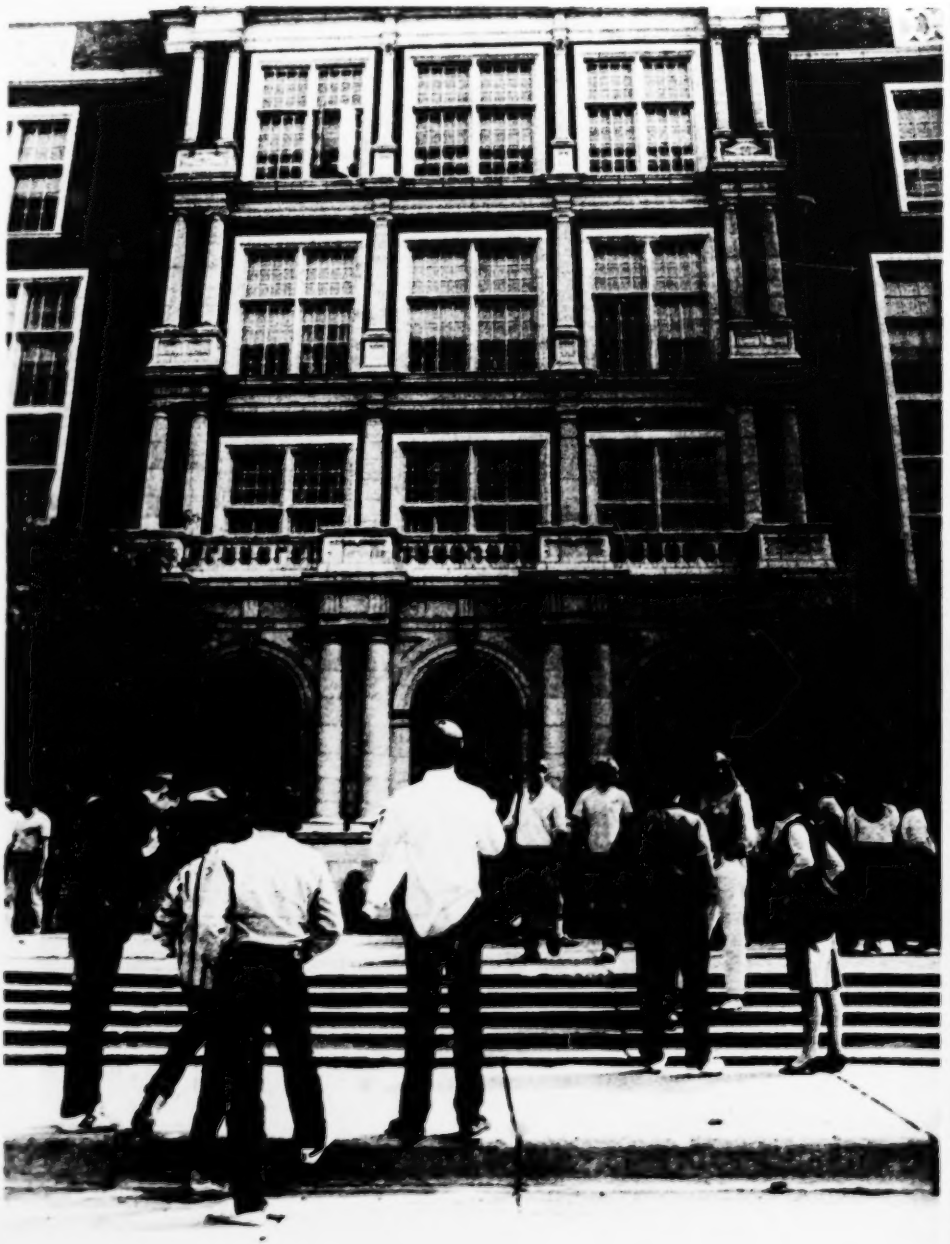
Lines, P. "A Review of Constitutional Principles Governing School Desegregation Requirements," LEC-82-12. Education Commission of the States: Denver, Colorado, November 1982.

Lines, P., C. Citron and J. Bray. "Teachers' Rights to Free Speech and Academic Freedom," ECS Issuegram no. 37.



NOTES

Jillian i'll meet you after school

1. For example, the Louisiana Supreme Court held that the constitutional delegation of authority to the board of education to prescribe courses of study did not preclude the legislature from passing a law requiring balanced treatment for creation science. Aguillard v. Treen, 440 So. 2d 704 (La. 1983).

2. Dennis v. County School Board of Rappahannock, 582 F. Supp. 536 (N.D.Va 1984). The school board maintained that state statutes prescribing procedures for retaining and dismissing teachers infringed on the supervisory authority granted school boards in the state constitution. The court held that the Virginia Constitution gave the legislature statewide authority to formulate policies to ensure a high-quality education system. Local boards were given authority to apply those legislative policies and to perform day-to-day management duties. Thus, the court held that creating a statewide tenure system was entirely within the authority vested in the legislature.

3. An exception to this general rule occurs where school districts and state boards of education are created as "bodies corporate," or given "home rule" status. Where there is no state policy, local education agencies and schools are free to initiate policy.

4. In *Hernandez v. Frohmiller*, the Arizona Supreme Court held that the statute establishing a civil service commission was unconstitutional because "it invades the constitutional powers of the board of regents by granting partial supervision of state educational institutions to the civil service board." Although the distinction between initiation or interpretation of policy is nebulous, the court gave some guidance: "[T]he powers given an administrative board must, by the provisions of the act, be surrounded by standards, limitations and policies." 204 P. 2d 85, 86 (Ariz. 1949).

5. Purnell v. State Board of Education, 93 A.518 (1915). Where the state board is of legislative creation, the legislature may modify, control or abolish it.

6. *See* Schecter Poultry Corp. v. United States, 295 U.S.495 (1935). This is one of the few cases where the Supreme Court voided a congressional grant of authority on the basis of an unlawful delegation.

7. *See* Application of Kohlman, 263 N.W. 2d 674 (SD 1978). "The fact that the determination of facts and the inferences to be drawn . . . pursuant to statutory standards and policy declarations call for the exercise of discretion is not fatal to the delegation of the power to the administrative agency." *See also*, Board of Education of Howard County v. McCrumb, 450 A.2d 919 (Md. App. 1982).

8. Deshostels v. State Professional Improvement Comm., 430 So. 2d 430 (La. App. 1st Cir. 1983).

9. Teachers automatically receive tenure after service as probationary teachers in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, Utah (depending on school district procedures), Virginia and Wisconsin. By contrast, in Florida a teacher must complete a three-year probationary period, hold a regular certificate and be recommended by the superintendent for continuing status based on performance evaluations and demonstrated competencies. Fla. Stat. sec. 231.36(3)(a)(1),(e) (Supp. 1983).

10. *E.g.*, Fla. Stat. Ann. sec. 231-29 (West Supp. 1983), Kan. Stat. Ann. secs. 72-9003, 72-9004 (Supp. 1982), Wash. Rev. Code Ann. sec. 28A.67.065 (1982). *See also* N.J. Stat. Ann. sec. 18A:6-75 (West Supp. 1983) establishing a performance evaluation project and developing "criteria for professional teaching competence based on performance evaluation prior to the issuance of initial teaching certificates."

11. Dodge v. Board of Educ., 302 U.S. 74, 79 (1937). *See e.g.* Indiana v. Board, 303 U.S. 95 (1938) (finding contractual rights due to wording of Indiana's tenure law).

12. A court considered it a demotion merely to transfer an assistant principal from a high school to a grade school, where he remained an assistant principal, at the same pay. Dowers v. Freetown — Lakeville Reg. School Dist., 467 N.E.2d 203 (Mass. 1984).

13. Alaska, California, Connecticut, Florida, Hawaii, Iowa, Kansas, Maine, New Hampshire, Vermont, Wisconsin.

14. Kan. Stat. Ann. sec. 75-4330(a)(4) (1980).

15. Kan. Stat. Ann. sec. 75-4326 & 75-4321(t) (1980).

16. Iowa Code secs. 19A.1, 19A.3(7) & 20.9 (1983).

17. Conn. Gen. Stat. Ann. sec. 5-728(e) (1983).

18. Wis. Stat. Ann. secs. 111.80 through 111.97 (West)

19. Wash. Rev. Code Ann. secs. 41.59.101 through 41.59.950 (1984).

20. Hawaii Rev. Stat. Ann. sec. 89-19 (1976).

21. *See e.g.*, Fla. Stat. Ann. sec. 47.309(3) (1981).

22. Kan. Stat. Ann. secs. 72–5413 through 72–5424 (1982), Wis. Stat. Ann. secs 111.80 through 111.97 (West).

23. Md. Educ. Code Ann. sec. 6–408(7) (1981).

24. Failure to provide due process may be costly. *See*, Fast v. School District, no 82–1906 (8th Cir. 1984) where the court rewarded $22,980 in attorney's fees to a teacher who was inappropriately denied reasons for her dismissal and a pre-termination hearing.

25. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

26. *Id.* at 575. In Vanelli v. Reynolds School Dist. No. 7, 667 F.2d 773 (9th Cir. 1982) a teacher was dismissed in the middle of the year because of allegations that he made improper advances to female students. Since the charge impaired his reputation for honesty or morality and because the mid-year dismissal affected the property interest in his contract, the Ninth Circuit held that he was entitled to a hearing prior to his dismissal.

27. Perry v. Sinderman, 408 U.S. 593 (1972). Even where there is no formal tenure policy, a property interest in continuing employment may arise when "the existence of rules and understandings, promulgated and fostered by state officials . . . justify [a] legitimate claim of entitlement to continued employment absent 'sufficient cause.'" 408 U.S. at 602–603.

28. Kanter v. Community Consol. School Dist. No. 65, 558 F. Supp. 890 (N.D. Ill. 1982) (failure to receive merit pay did not affect a liberty or property interest); Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979). In *Clark*, the court ruled that denial of a promotion will generally not invoke a due process requirement, but if it does "it is at most a very limited right, or one calling for far less stringent procedural requirements then normally required in a trial-type situation. It unquestionably could not go beyond the right to know the ground for denial of promotion and an opportunity to present his reasons for feeling he was entitled to promotion."

29. Tenn. Code Ann. sec. 49-5-5205(j)(5)(A), (B) (Supp. 1984).

30. Roberts v. Lincoln Cty. School District No. 1, 676 P.2d 577–850 (Wyo. 1984) *citing* Vitarelli v. Seaton, 359 U.S. 535 (1959). This rule does have exceptions, however. In *Roberts*, a nontenured teacher challenged her dismissal on the grounds that a board regulation requiring four teacher evaluations during the school year had not been followed. The court noted the evaluation rule was not "designed for the protection of nontenured teachers such as appellant, but were primarily for the benefit of the school district in performing its operational and supervisory duties." 676 P.2d at 581. Therefore, failure to follow the procedure in this case had no impact on the right of the teacher not to be terminated. Id. at 582. *See also*, Hasan v. Frederickson, 683 P.2d 203 (Wash. App. 1984).

31. Debra P v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397 (5th Cir. 1981). *But see*, Bester v. Tuscaloosa City Board of Educ., 722 F.2d 1514 (11th Cir. 1984) (*held* initiation of a promotion policy in elementary schools did not affect a property interest of the students held back under the policy).

32. *Compare* Board of Regents v. Roth, 408 U.S. 654 (1972) with Perry v. Sinderman, 408 U.S. 593 (1972).

33. In a Montana case, the statement of reasons requirement was held to require specific statements regarding the competence of the teacher. Bridger Education Ass'n. v. Board of Trustees, Carbon Cty. School District No. 2, No. 83–310, *Slip Op.* at 3–4 (Mont., March 29, 1984). A federal district court in Virginia held that a school district must abide by the statutory requirement that a probationary teacher be given notice, a statement of reasons and a conference before termination. Failure to do so would violate the teacher's due process rights. Dennis v. County School Board of Rappahannoch Cty, 582 F. Supp. 536 (W.D. Va 1984) (*held*, motion of school board to dismiss claim of nontenured teacher that due process was denied will not be granted.) *See also*, School District No. 8 v. Superior Court, 102 Ariz. 478 (1967).

34. There is often a question of when a full evidentiary hearing must be held. As a general rule in employment cases, an opportunity for some kind of hearing must be given before the action is taken, except in emergencies. For a discussion, *see* Vannelli v. Reynolds School District No. 1, 667 F2d 773 (9th Cir. 1982). The Supreme Court has agreed to hear a case discussing this issue, see Loudermill v. Cleveland Board of Education, 721 F.2d 550 (6th Cir. 1983) *cert granted*, Cleveland Board of Education v. Loudermill, 104 S. Ct. 2384 (May 21, 1984).

35. *Roth, supra* at 570.

36. The right to be represented by counsel in dismissal hearings is allowed by statute in 43 states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode

Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

37. Olds v. Board of Educ. of Nashua Comm. School Dist., 334 N.W.2d 765 (Iowa App. 1983). *Olds* concerned the impartiality of a review board. First, the court noted that there is no due process violation for judges and administrators to rehear a case after they were reversed on appeal. Second, an impartial hearing officer was ensured if "any board member who harbors prejudice [recuses] himself. . . . Board members possessing personal knowledge must place it aside or, if they are unable to do so, themselves step aside . . . the decision turns on [the board's] own finding of the presence or absence of qualifications and not on the recommendation of an administrator or prior employer. . . ." 334 N.W.2d at 769 *citing* Bishop v. Keystone Area Educ. Agency No. 1, 275 N.W.2d 744, 752 (Iowa 1979). *See also*, Hassan v. Frederickson, 683 P2d 203 (Wash App. 1983).

38. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

39. *See Olds, supra* note 13.

40. *Board of Education of Howard County v. McCrumb*, 450 A.2d 919 (Md. 1982).

41. *See, McCrumb, Id.* at 923.

42. In Columbus Board of Education v. Pennick, 443 U.S. 449, 464–65 (1979), for example, the Court ruled that "actions having foreseeable and anticipated disparate impact are relevant to prove the ultimate fact, forbidden purpose." Thus public officials who stick to a particular practice or policy, "with full knowledge of the predictable effects" of their policies may be presumed to intend the results of those policies.

43. For example, in the United States v. South Carolina, 445 F. Supp. 1094, 1107–08 (S.D.C. 1977), a three-judge court, after finding no race discrimination in a system of testing and classifying teachers to determine rank for pay scale, proceeded to consider whether it was constitutional to discriminate in pay between teachers with higher and lower scores. The court concluded that the use of the test had a rational relationship to the goal of improving teacher quality.

44. *See* Brown v. Board of Education, 347 U.S. 483, (1954).

45. Mississippi Univ. for Woman v. Hogan, 102 S. Ct. 3331 (1982). "Heightened" review is appropriate in cases dealing with the right to free public education. Plyler v. Doe, 102 S. Ct. 2382 (1982). (The term "heightened review" is from 102 S. Ct. 2382, at 2406 (Powell, J., concurring).

46. Ballard v. Blount, 581 F.Supp. 160 (N.D. Ge. 1983); Stone v. Board of Regents, 620 F.2d 526, 529 n. 8 (5th Cir. 1980).

47. For example, one court, reviewing North Carolina's program of testing teachers for certification and pay purposes, initially ruled the program invalid under the constitution alone. It vacated this judgment and proceeded under Title VII, which had also been in issue, after the Supreme Court decided Washington v. Davis 426 U.S. 229 (1976). United States v. North Carolina, 400 F. Supp. 343, 349 (E.D.N.C. 1975), vacated, 425 F. Supp. 789 (E.D.N.C. 1977).

48. 42 U.S.C. sec. 2000e (1976 & Supp. V, 1981).

49. To take a harder example, the Supreme Court has ruled that an explicit gender requirement for "contact positions" for guards in a male prison is a "bona fide occupational qualification." The Court held that this exception was to be construed narrowly, but found that, under conditions in Alabama maximum security prisons for men, use of female guards "would pose a substantial security problem, directly linked to the sex of the prison guard." The Court concluded that the requirement that a guard be male was a bona fide occupational requirement. Dothard v. Rawlinson, 433 U.S. 321, at 336 (1977). 10a. 414 U.S. 563 (1974).

50. For examples of this type of case *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); United States Postal Service v. Aikens, 103 S. Ct. 1478 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

51. United States Postal Service v. Aikens, 103 S. Ct. 1478 (1983).

52. Kumar v. Board of Trustees of Univ. of Mass., 566 F. Supp. 1299 (D. Mass. 1983); Harris v. Birmingham Board of Educ., 712 F. 2d 1377 (11th Cir. 1983).

53. Nagel v. Avon Board of Educ., 575 F. Supp. 105 (D. Conn. 1983).

54. 77 Stat. 56, 93, 29 U.S.C. sec. 206(d)(1) (1982).

55. In the leading Supreme Court case, involving Corning Glass Works, male inspectors on night shifts received more than female inspectors on day shifts. In June 1966, women were allowed to bid for the night jobs as vacancies occurred on an equal, seniority basis. In 1969, after a reevaluation of all jobs, Corning placed all inspectors on the same rate, which was higher than the previous night shift, although a grandfather clause allowed previous night shift employees to receive a higher rate (the "red circle" rate). The Court held that Corning had violated the Act up to June 1966. The Court ruled that the meaning of "working conditions" in the law does not refer to time of day but that the time can refer to a "factor other than

sex." Nonetheless, the Court was unconvinced that higher night rates were because of the hour. The Court also found a failure to cure violation as the "red circle" rate carried forward past discrimination. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

56. 42 U.S.C. sec. 2000d (1976 & Supp. V, 1981). For a discussion of Title VI requirements, see Lines, "Intent to Discriminate and Title VI of the Civil Rights Act of 1964: *Lau, Bakke* and *Guardians*," ECS: Denver, Colo., April 1984. 20 pp.

57. 45 C.F.R. sec. 80.3.

58. U.S.C. secs. 1681–1686 (1982).

59. See 20 U.S.C. secs. 1681(a)(3) through (9) (1982).

60. 20 U.S.C. sec. 1681(b) (1982).

61. 20 U.S.C. sec. 1681(c) and 1683 (1982).

62. Cannon v. University of Chicago, 441 U.S. 677 (1979).

63. North Haven Board of Educ. v. Bell, 101 S. Ct. 1345 (1981).

64. 29 U.S.C. sec. 794 (1982).

65. 29 U.S.C. secs. 794a & 794a(2) (1982).

66. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

67. Id. at 436.

68. Washington v. Davis, 426 U.S. 229, 247 at N. 13 (1976).

69. While acknowledging that there is no single method for validating the relationship of employment tests to job performance, the court has recognized three basic methods, empirical or criterion validity, construct validity and content validity. For a description of this and other testing issues *See*, Lines, Teacher Competency Testing: A Review of Legal Considerations, ECS Working Paper no. LEC-84-6, October 1984.

70. Bratton v. City of Detroit, 704 F.2d 878, 886 (6th Cir. 1983); Detroit Police Officers Ass'n v. Young, 608 F.2d, 689 (6th Cir. 198-). This has been extended to local education agencies by lower courts. *See*, Marsh v. Board of Education, 581 F. Supp. 614 (E.D. Mich. 1984).

71. Title VII protects white males. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281 no. 8 (1972).

72. Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). The most recently hired were minorities, due to a consent device, but the Court refused to give the consent device much weight, as it provided only for affirmative action in hiring and not for displacement of white workers. In addition, "there was no finding that any of the blacks protected from layoff had been a victim of discrimination" and none had received an award of competitive seniority. *Id.* at 2588.

73. Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming. Louisiana's equal rights amendment, however, applies a lesser standard than the Supreme Court. *See*, La. Const. act 1, sec. 3. "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of ... sex. ..."

74. Roberts v. Jayees, 104 S. Ct. 3244 (1984).

75. The Alaska education code provides:

> Recognizing the benefit to our state and nation of equal educational opportunities for all students, and equal employment opportunity for public education employees, discrimination on the basis of sex against an employee or a student in public education in Alaska violates [the Alaska constitution] and is prohibited. No person in Alaska may on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal or state financial assistance. Alaska Stat. sec. 14.18.010 (1982).

76. The question of whether the federal assistance must go to their salaries has not been formally answered by the Supreme Court, although in *Grove City College v. Bell*, the Court implied that direct receipt of federal funds as salary was not required.

77. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 506 (1969).

78. Bob Cary v. Board of Educ. of the Adams-Arapahoe School District 28-J, Aurora, Colorado, 427 F. Supp. 945, 952 (D. Colo. 1977).

79. Buress, Lee and Jenkinson, The Students' Right to Know, National Council of Teachers of English, Urbana: Ill., 1982.

80. Pickering v. Board of Educ., 391 U.S. 563 (1968).

81. *See* Kingsville Ind. School Dist. v. Cooper, 611 F.2d — 1109, 1113 (1980); Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

82. Harris v. Mechanicville Central School District, 408 N.Y.S.2d 384 (1978).

83. Ahern v. Grand Island School Dist., 456 F.2d 399 (8th Cir. 1972).

84. Connick v. Myers, 103 S. Ct. 1684 (1983). The Court has since agreed to review an 11th Circuit Court of Appeals interpretation of *Connick* as it applies to schools. The plaintiff in Renfroe v. Kirkpatrick, 53 U.S.L.W. 3032, has argued that the ability of faculty to speak out freely is critical, and that the *Connick* decision (which centered on a district attorneys' office) should not be applied to education.

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4. **Political Myths About Reforming Teaching** by Susan J. Rosenholtz, Vanderbilt University, TQ84-4

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5. **How States Can Improve Teacher Quality** by Robert Palaich, Education Commission of the States, TQ84-5

   Local efforts to improve teacher quality can be initiated and/or bolstered by state actions, and Palaich offers a logical cumulative strategy for these actions. He covers screening for admission to schools of education, improving curriculum, graduation requirements, certification and tenure. He also shows how states can help develop and fund better evaluation systems, in-service training and performance reward systems, explaining that certain areas of choice should be left to local districts.

6. **The Legal Context for Teacher Improvement** by the Education Commission of the States' Law and Education Center, TQ84-6

   In an effort to pre-inform policy makers and administrators contemplating teacher improvement plans, ECS Law Center staff explain the legal aspects that may affect these plans, and discuss how to tailor plans to comply with constitutional and statutory requirements. Due process, civil rights, free speech, academic freedom, tenure, collective bargaining and governance issues are covered. Case cites and a selected bibliography support the authors' arguments.

7. **A Guideline for Evaluating Teacher Incentive Systems** by Steven M. Jung, American Institutes for Research, TQ84-7

   Jung develops a conceptual framework for evaluating teacher incentive systems. A performance-based system, he says, bases rewards on behavior rather than on added responsibilities. Stated goals must mesh with goals in practice if evaluations are to be valid. Jung also examines assumptions about teaching excellence and the process components of incentive systems.

8. **School Organization and the Rewards of Teaching** by Thomas Bird, Boulder, Colorado, TQ84-8

   Bird focuses on how to organize schools and school settings to encourage better teaching. He describes organizational schemes that encourage staff to share understandings and techniques, help each other to improve and use research findings to test new methods. He suggests that teachers and administrators be trained as role models, and recommends that experimental research applications be supported at the state level.

9. The Costs of Performance Pay Systems
by Kent McGuire, Education Commission of the States, and John A. Thompson, University of Hawaii, TQ84-9

Using two different evaluation systems, the authors simulate the costs of merit pay, career ladders and extended contracts to show how costs — none of them prohibitive — vary with plan design. The authors precede the simulations with a thorough discussion of each cost factor involved.

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